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Supreme Court U.S.
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No. 02-332

In The

Supreme Court of the United States

JACK COMBS,

Petitioner,

v.

FAIR HOUSING OF MARIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

A. Response To Discussion Re Alleged Discriminatory Conduct

Mr. Combs *strongly denies* FHOM's allegations that he discriminated against African-Americans in the operation of Waters Edge Apartments. It is undisputed that Mr. Combs rented apartments to at least ten separate African-American tenants during his ownership of the building (ER 140-44), that Mr. Combs also rented to at least nine different Hispanic, Asian and Filipino tenants (*id.*), and that the racial makeup of Waters Edge was not statistically different from the surrounding community.[1] (*Id.*) This matter was investigated by the California Department of Fair Employment and Housing, which found that "the African-American tester was not discriminated [against] during the application process." (See Petition, p.5, n.2.) The DFEH also found that "since no one was subject to any harm, complainant has no standing to file." (*Id.*)

None of the unfounded allegations in Respondent's Brief is included in FHOM's complaint. Nonetheless, consistent with FHOM's litigation tactics throughout this case, these untrue allegations are prominently included in Respondent's Brief for the obvious purpose of trying to bias this Court against Mr. Combs. Nonetheless, these arguments support Mr. Combs' Petition since the facts show that Mr. Combs' alleged misconduct had no impact on FHOM and did not cause "injury in fact" to FHOM as

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[1] According to 1990 census data, Marin County is about 85% Caucasian, 8% Hispanic, and 3.27% African-American. (SER 567.) At her deposition, FHOM's Executive Director estimated that the percentage of African-Americans in the community where Waters Edge Apartments is located is about "7% to 8%." (ER 267.) Based on the Stipulation of the Parties filed just prior to the trial date (ER 140-144), Mr. Combs rented to about 66 different tenants while he owned the building, and at least 17 of those tenancies (26%) and possibly more were African-American, Asian, Hispanic or Filipino.

required by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

FHOM's witnesses are biased and the complaints are untrue. Each of the parties who complained against Mr. Combs is a former tenant who was properly evicted or given notice. Carla Urmy was evicted by Mr. Combs for legitimate reasons (Request for Judicial Notice ["RFJN"], para. 3, exh. C), and she filed an administrative housing discrimination complaint against Mr. Combs that was investigated and found to be without merit. (ASER 29, 45-48; RFJN, Para. 3, Exh. D.) Likewise, Fatima Muhammed and Cindy Mitchell, African-American tenants who complained to FHOM, were given 30 day notices to pay or quit for legitimate reasons, not because of their race. Ms. Muhammed was given notice because of repeated complaints from other tenants about noise from her and her family, failure to pay rent timely, and her security deposit check bounced. (ASER 10.) Ms. Mitchell was given notice because she and her family constantly disturbed the neighbors, by among other things, repeated loud altercations with each other. (ASER 12.)[2] Linda Sangster was evicted because she simply stopped paying her rent. (ASER 11.) Scott Wilmore is a disgruntled former tenant who was evicted for violating several material provisions

[2] Mr. Combs rented apartments to Ms. Mitchell and Ms. Muhammed knowing their race, which disproves FHOM's allegations of discrimination. FHOM argues that Mr. Combs did not know Ms. Mitchell's or her family's race and cites to her declaration as support for that statement. (Respondent's Brief, p. 5.) However, Ms. Mitchell's declaration does not say that, and Mr. Combs in fact knew her race because the Housing Authority told him this information before the unit was rented to her. Mr. Combs contends that he asked the Housing Authority about the rental history of the people who were planning to move in, and in response the Housing Authority provided information about her and her family, including her race. If these individuals were discriminated against, why did they not join this action as plaintiffs or at least pursue the available administrative remedies? If they had, FHOM would not have had to bring this suit in its own name and this standing argument would be unnecessary.

of the lease agreement, including playing loud music, parking in other tenants' spaces, letting his dog run loose, threatening another tenant, etc. (ASER 10-11.) In fact, Mr. Wilmore's apartment was rented to an African-American tenant immediately after he was evicted. (ER 141.)

Likewise, the "tests" conducted by FHOM are flawed because the tests were not "controlled matched pairs," and because Mr. Combs did not in fact refuse to rent to the African-American testers. The October 1994 test was done by Vikki Radden, an African-American woman, and Jeff Fishback, a Caucasian male. Ms. Radden did not complete the test. Ms. Radden was given an application by Mr. Combs and on a follow up visit was told the apartment was still available and that it would be "fine" for her to drop off the application in a few days. (ASER 55.) However, Ms. Radden revealed, "Due to my work schedule, I wasn't able to submit the application to Waters Edge Apartments." (SER 774-775.) Instead, another individual, Maketa Groves, pretended to be Radden's sister, and delivered the completed application ten days later. (SER 984-985.) However, rather than giving it to Mr. Combs or the manager, Ms. Groves just left the application with a grandmother who was babysitting her daughter's children in one of the apartments. (SER 985, 991.) Two days later, Ms. Groves called and spoke with Mr. Combs' wife to follow up. Ms. Groves noted that "on both occasions of phone contact [Mrs. Combs] was personable, cheerful sounding, and pleasant." (SER 991.) Ms. Radden's report states that the landlord answered her questions "openly" when she was shown the apartment. (SER 781.) Despite the irregularities in returning the application, there is *no* evidence that Mr. Combs refused to rent an apartment to Ms. Radden. (ASER 128, 156.)

With regard to the second test, the record shows that the African-American tester (Korissa Russell) was treated politely and the same as the Caucasian tester. For example, Ms. Russell was by told Mr. Combs' father in response to her question that units were available, and she was shown an available apartment. (ASER 92-93.) She was

also told the building and the surrounding neighborhood were quiet, and that although the neighborhood got a lot of bad press, "it's a good neighborhood." (ASER 92.) Moreover, both of the testers had bad credit and neither Ms. Russell nor the Caucasion tester Perry Grey was offered an apartment because they had bad credit. (ASER 70-88, 90-105.) In both sets of tests there was a notable lack of follow-through by the African-American testers. Moreover, Mr. Combs rented an apartment to an African-American tenant (Cindy Mitchell) less than 2 months after FHOM's tester Mr. Fishback visited the apartments. (ER 141.) This disproves Mr. Fishback's false declaration against Mr. Combs. (For a more complete response to FHOM's allegations of discrimination, see ASER 10-16.)

B. Response To Allegations Regarding Procedural History

Just as there was no discrimination, there also was no discovery abuse. Like FHOM's unfounded allegations regarding the alleged discrimination, FHOM's assertions regarding Mr. Combs' alleged discovery abuse are irrelevant to the issues raised by this Petition and are apparently an attempt to bias this Court against Mr. Combs. The record shows that the terminating sanction was unjustified and grossly unfair since it deprived Mr. Combs of the opportunity to respond to the false allegations that he discriminated against African-Americans in the operation of Waters Edge Apartments.

It is vitally important for this Court to understand that the series of discovery orders issued by the district court against Mr. Combs were based on misrepresentations by Mr. Combs' prior *attorneys*, Patrick J. Manshardt and Mark V. Santa Romana, not by Mr. Combs or his wife. Mr. Combs and his wife were never told by their prior attorneys about motions, warnings, and court orders dated May 27, 1998, May 29, 1998, July 9, 1998, July 20, 1998,

July 24, 1998, July 31, 1998 and October 5, 1998, and FHOM has never raised any evidence to the contrary.[3]

Further, Mr. Combs did not refuse to produce documents and did not wilfully violate any orders by the district court. The record shows that Mr. Combs' prior attorneys failed to tell him or his wife of the court's warnings and orders, and those attorneys admitted in sworn declarations that *they were at fault* for not complying with the court's orders because they had a backlog of work resulting from three trials and an injury to one of them. (ER 31-32, 43-44, 46-47 and 51.) Further, it is not disputed that, at his deposition, Mr. Combs told FHOM's attorneys that there might be additional documents, and those documents were promptly produced to FHOM. (Respondent's Brief, p.6.) This shows that there was no willful failure to comply and that the orders against Mr. Combs were due to the fault of his former attorneys.

II. REPLY TO RESPONDENT'S REASONS FOR DENYING WRIT

A. Only Persons Who Suffer "Injury" May Enforce The Fair Housing Act

The Fair Housing Act defines an "aggrieved person" as a person "who has been *injured* by a discriminatory housing practice." 42 U.S.C. section 3602(i)(1) (emphasis added). This is consistent with *Havens Realty* and other decisions

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[3] FHOM's brief in the Ninth Circuit included the following citations to misrepresentations by Mr. Combs' *former attorneys*: ER22C [lawyers represented to the district court that Combs does not maintain any records of applicants], SER168-177 [correspondence from FHOM's attorney to Combs' attorneys regarding production of documents and information], ER37 and ER33 at line 3 [declaration by Mark V. Santa Romana that "defendant has now fully complied with Magistrate Judge Hamilton's March 19, 1998 order"], SER 2, 49-50 [representations by Patrick Manshardt that all documents ordered to be produced had been produced]. There is no citation to any such representation by Mr. Combs or his wife, and in fact there was none.

that require "injury in fact" as the basis for standing to sue under the act.

B. FHOM Was Required To Prove "Injury" In Its Motion For Default Judgment – It Could Not Just Rely On The Allegations In The Complaint

The allegations of FHOM's complaint alone were not sufficient to establish standing at the stage of the proceedings when judgment was entered against Mr. Combs. FHOM was required to state facts and submit evidence commensurate with its burden of proof at the time judgment was entered. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 561 (1992); *Havens Realty*, 455 U.S. at 379, n.21. When the district court considered FHOM's motion for default judgment, it accepted the factual allegations in FHOM's complaint regarding *liability* as true, but it was required to make particularized findings as to the nature and amount of FHOM's damages. See *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). Therefore, at that stage of the proceedings, the nature and extent of FHOM's injuries (standing) was required to be proved by admissible evidence.

Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinea, 456 U.S. 694 (1982) is not to the contrary. In that case, the Court held that personal jurisdiction is an individual right which can be waived by misconduct, such as failing to comply with discovery. *Id.* at 703. However, the Court distinguished subject matter jurisdiction, which is a requirement under Article III and cannot be conferred by agreement or action of the parties. Therefore, the Court may not assume standing exists as a discovery sanction. *Id.* at 702.

C. Havens Realty Does Not Hold That Expenditure Of Resources To Investigate Or Prosecute Discrimination Alone Is Sufficient To Impart Standing

FHOM's discussion of this issue highlights the confusion engendered in the Circuit Courts as a result of *Havens*

Realty. The confusion turns on the nature of the "injury" that is necessary to confer standing on a fair housing organization. Under *Havens Realty*, the injury must be *to the organization's activities*. The expenditure of resources to mitigate such an injury is a manifestation of the injury and will support standing. *Havens Realty* does *not* hold that the mere expenditure of resources to counteract discrimination will support standing without some other real injury to the organization. If a fair housing organization is permitted to bootstrap standing, then the Article III requirement of "injury in fact" is rendered meaningless.

The cases cited in Respondent's Brief make sense only if the organization is expending its resources to counteract the effects of the discrimination *on the organization itself*. None of the decisions cited by FHOM hold that standing may be conferred when an organization expends its resources to counteract the adverse effects of discrimination *on someone else*. In *Havens Realty*, plaintiff HOME's complaint alleged that the defendants' racial steering practices frustrated HOME's "efforts to assist equal access to housing through *counseling and other referral services*." *Havens Realty*, 455 U.S. 379 (emphasis added). In other words, assuming the complaint's allegations to be true, the defendants' racial steering practices interfered with HOME's own counseling and referral work. In response, HOME allegedly devoted resources to identify and counteract the defendants' misconduct, and this was a consequential injury resulting from the actual injury to the organization's activities.

In contrast, here, FHOM's evidence established only that it expended resources in response to complaints made to it by third parties, all untrue, by tenants who had been evicted or given notice. There is no evidence and, indeed, *no claim* that FHOM expended resources investigating and prosecuting Mr. Combs for the purpose of counteracting injury to FHOM's own activities. FHOM's expenditure of resources was self-directed, whereas the injury alleged by HOME, namely the interference with HOME's counseling and referral services, was not. So under these facts, FHOM did not experience injury in fact and, moreover, the causation element for standing is not satisfied.

FHOM's discussion of the *Havens Realty* case (Respondent's Brief, pp. 14-15.) is not illuminating because FHOM does not discuss the nature of the injury that is necessary to confer standing, which is the focus of this Petition. FHOM incorrectly argues that standing is established simply by "a showing of the need to counteract discrimination." *Havens Realty* makes no such pronouncement. On the contrary, *Havens Realty* requires a "concrete and demonstrable injury to the organization's activities." *Havens Realty,* 455 U.S. at 379. If there is a need to counteract the defendant's activities, it must stem from an actual or threatened injury to the organization.

D. There Is A Conflict Among The Circuit Courts As To Whether The Expenditure Of Resources Without Other Injury Is Sufficient To Impart Standing

FHOM's argument ignores the authorities that expressly recognize this conflict. For example, in the *BMC Marketing* case, the D.C. Circuit expressly disagreed with the Seventh Circuit's holding in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). See *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994). Also, the Eleventh Circuit has specifically allied itself with the Seventh and Second Circuits and rejected the D.C. Circuit's holding in *BMC Marketing*. See *Central Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629, 642 (11th Cir. 2000). So, contrary to FHOM's assertion, the Courts and commentators recognize the split. (See Petition, pp. 15-16.)

If some of the Circuits have adopted a broad test that allows standing based on an organization's voluntary allocation of resources to investigation or litigation, then Mr. Combs submits those Courts have misinterpreted *Havens Realty* and adopted a rule that is contrary to fundamental Constitutional doctrine. Standing cannot be manufactured by a litigant who pleads and proves only self-directed use of resources. Otherwise, both the "injury in

fact" and causation elements of the test for standing are rendered meaningless.

FHOM's discussion confuses rather than clarifies the issue. It is not helpful to talk about an unspecified "need" to counteract a defendant's discrimination. "Injury in fact" is not defined as involving any "need."[4] A more accurate question might be: is the "need" to counteract the discrimination based on an actual injury to the organization? Likewise, it is not helpful to talk about injury to a fair housing organization's "mission." HOME's complaint in the *Havens Realty* case did not allege injury to HOME's "mission." *Havens Realty* specifically recognized that a mere "setback to the organization's abstract interest" does not support standing. *Havens Realty*, 455 U.S. at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

Furthermore, there is no evidence at all to suggest that Mr. Combs' alleged misconduct adversely affected FHOM's "mission" by increasing the number of people in need of counseling, reducing the effectiveness of FHOM's outreach efforts, or making FHOM's overall task more difficult in any meaningful sense. (See Respondent's Brief, pp. 20-21.) Mr. Combs operated one 18 unit apartment building in a county which had, according to FHOM's statistics, 37,433 rental units in 1994. (ER 183.) It is "implausible" that discrimination at a single housing complex could give rise to a "distinct and probable injury" throughout a metropolitan area or county. *Havens Realty*, 455 U.S. at 377. Moreover, a fair housing organization cannot claim it has been injured under facts such as presented in this case when the organization is funded *for the specific purpose* of investigating and prosecuting those who allegedly discriminate. FHOM has no legally protected interest in not using its resources for the very purpose those resources

[4] "Injury in fact" is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

were intended. See *Assoc. for Retarded Citizens v. Dallas County Mental Health*, 19 F.3d 241, 244 (5th Cir. 1994).

E. FHOM Was Awarded Damages For Both Pre-Litigation Investigation And Prosecution Of This Lawsuit

The final section of Respondent's Brief (pp. 22-25) begins by discussing the different holdings in various Circuit Court decisions regarding diversion of resources based on pre-litigation investigation or litigation. This contradicts FHOM's argument in the previous section of its brief that there is no circuit conflict on the question presented here. Then, FHOM argues that this case "does not involve a diversion of resources to a pre-litigation investigation alone or a diversion of resources to expenses associated with litigation alone." (Respondent's Brief, p. 24.) The record is clear, however, that FHOM was awarded damages based on staff time for *both* pre-litigation investigation *and* prosecution of this action. (ER 157-161, App. 34.) Although Mr. Combs does not believe there is a legitimate distinction for the purposes of standing between pre-litigation expenditures and expenditures associated with the prosecution of lawsuits (because both are self-directed), if there is a legitimate distinction, it should have been taken into account by the lower courts.

III. CONCLUSION

Respondent's Brief illustrates both the split of authority among the Circuit Courts and the common misinterpretation of the *Havens Realty* decision that are the basis for this petition. Respondent's Brief is also notable for what it does not dispute – FHOM does not contest that this issue is recurring and of great practical importance to fair housing organizations, tenants, and housing providers nationwide. Therefore, this petition ought to be GRANTED.

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